

W. A. FITZHUGH (ON RECONSIDERATION)

IBLA 75-42

Decided January 6, 1975

Petition for reconsideration of W. A. Fitzhugh, 18 IBLA 94 (1974), concerning oil and gas lease ES-5326 (Miss.).

Petition granted; decision reversed and case remanded.

1. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Rentals

An oil and gas lease terminated by operation of law for failure to pay the advance rental timely will be reinstated where it is shown, upon reconsideration of an earlier Board decision, that lessee's failure to pay the rental timely was not due to a lack of reasonable diligence. Evidence which establishes that the payment due on May 1, 1974, at the Eastern States Office, Bureau of Land Management, Silver Spring, Maryland, was mailed in Dallas, Texas, on April 25, 1974, five days before the due date, is sufficient to demonstrate due diligence despite the fact that the envelope containing the payment was postmarked April 30, 1974.

APPEARANCES: W. A. Fitzhugh, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

W. A. Fitzhugh filed on December 9, 1974, a petition for reconsideration of our decision in W. A. Fitzhugh, 18 IBLA 94, rendered on November 27, 1974.

That decision recited in applicable portion as follows:

The Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 188(b) (1970), 1/ provides that an oil and gas lease terminates by operation of law if the annual rental is not paid on or before the anniversary date of the lease. The Act further provides

for the reinstatement of a terminated lease upon a petition showing that failure to make timely payment "was either justifiable or not due to a lack of reasonable diligence." 30 U.S.C. § 188(c) (1970); 43 CFR 3108.2-1(c).

The BLM received appellant's rental check, dated April 25, 1974, on May 3, 1974, a Friday, in an envelope postmarked "PM 30 APR 1974." Appellant asserts, in his statement of reasons, that his secretary mailed the payment the same day it was dated, April 25, 1974, earlier than he has mailed payment in other years, and, he asserts, sufficiently early to demonstrate reasonable diligence.

[1] This Board has granted reinstatement in cases where the postmark demonstrates that the payment was deposited in the mails early enough to show reasonable diligence. R. G. Price, 8 IBLA 290, 292 (1972). If the postmark does not demonstrate reasonable diligence in the lessee's mailing of the payment, the Board will not go beyond it in the absence of exceptional circumstances. See Mary White, 13 IBLA 363 (1973) (assertion that money order was mailed when purchased supported by additional probative evidence); A. Anton Frederickson, A-30793 (November 28, 1967) (affidavit of witness to mailing); John W. Monzel, A-28817 (August 31, 1961) (letter from post office detailing possibility of delay).

In the absence of credible objective or documentary evidence to the contrary, the postmark date will be deemed the date of mailing. Mailing payment April 30, the day before it is due, is not the exercise of reasonable diligence contemplated by the statute and regulation. Louis Samuel, 8 IBLA 268 (1972).

Nor has any showing been made that the failure to pay rental timely was justifiable. (Footnote omitted.)

[1] Together with the petition for reconsideration, petitioner submitted an affidavit of Penny Hodge, his secretary, dated December 4, 1974. That affidavit recited that a letter dated

June 19, 1974, sent by the Eastern States Land Office was received in Dallas on June 28 and was so postmarked. Photostatic copies of the envelope and letter were attached. Moreover, affiant stated under oath that "check #5454 for the annual rental on Oil and Gas Lease #ES-5326 was written and mailed to the Bureau of Land Management on the 25th day of April, 1974." An affidavit by another employee supported this statement.

This evidence impels the conclusion that the rental check was mailed on April 25, 1974 (five days before the anniversary date), and not on the date the envelope was postmarked, i.e., April 30, 1974 (the day before payment was due).

The regulation, 43 CFR 3108.2-1(c)(2), recites in part as follows:

Reasonable diligence normally requires sending or delivering payments sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal and delivery of the payment.

See Louis Samuel, 8 IBLA 268 (1972); R. G. Price, 8 IBLA 290 (1972).

We find that petitioner's failure to pay the rental timely was "not due to a lack of reasonable diligence." 30 U.S.C. § 188(c) (1970); Karl Heinz Schober, 16 IBLA 382 (1974); Sharon Rae Cook, 15 IBLA 424 (1974); Mary White, 13 IBLA 363 (1973).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of November 27, 1974, is reversed and the case remanded to the Eastern States Office, Bureau of Land Management, for further processing consistent with this decision.

Frederick Fishman
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

I concur in the result:

Joan B. Thompson
Administrative Judge.

